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Public Prosecutor v Ilag Mary Melanie Cailipan

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HIGH COURT (KUCHING) — CRIMINAL TRIAL NO KCH-45A-4/2 OF 2015
ALWI ABDUL WAHAB JC
20 OCTOBER 2016

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Criminal Law — Dangerous Drugs — Trafficking — Accused charged for trafficking in methamphetamine under s 39B(1)(a) of the Dangerous Drugs Act 1952 punishable under s 39B(2) of the same — Whether accused had drug in his possession — Whether drug was methamphetamine and listed in First Schedule of the DDA — Whether accused did traffic in drug — Whether prima facie case made out — Whether prosecution proven its case beyond reasonable doubt — Dangerous Drugs Act 1952 ss 37(da)(xvi), 39B(1)(a) & (2)

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The accused was charged with the offence of trafficking in dangerous drugs, methamphetamine under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the DDA') punishable under s 39B(2) of the same. The prosecution relied upon the evidence of custom officers ('PW4, PW5, PW6 and PW8'), the chemist ('PW3') and the investigating officer ('PW9') to prove their case against the accused. Based on the evidence, upon the arrival of the accused at the Kuching International Airport, the accused was spotted carrying her black luggage bag ('exh P14') and upon inspections, the custom officers found several capacitors inside exh P14. PW8 cut open one of the capacitor and found materials which were suspected to be drugs. PW3 who conducted analysis of the capacitors found that the crystalline substances found inside the capacitors contained 2,285g of methamphetamine. In defence, the accused averred that she had no knowledge of the contents of exh P14 and was an innocent carrier. The accused contended that she received the bag from one black man named Dick and was asked by her friend named Jacklyn to carry exh P14 when she boarded a flight from Hong Kong to Kuching. The three essential ingredients of the offence for court's consideration were: (a) whether the accused had the drug in his possession; (b) whether the drug was methamphetamine and listed in the First Schedule of the DDA and weighed 2,285g; and (c) whether the accused did traffic in the drug.

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Held, convicting the accused of the offence and sentencing her to death:

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(1) By having the luggage bag with her, carrying it and putting it on the scanner machine, the accused had taken physical custody and control of it and its contents. The accused's knowledge of the contents of exh P14 could be inferred from the facts and the circumstances of the case. In the

present case, the drugs were carefully concealed inside the capacitors which indicated an intention to avoid detection and thereby point to the accused's knowledge. Thus, the prosecution had sufficiently proved that the accused was in possession of exh P14 and the drugs which were found (see paras 15 & 17–19).

(2) There was no doubt as to the identity of the exhibits as the contents of the capacitors were still intact before they were sent to PW3 for analysis (see para 23).

(3) What would be an adequate quantity of the samples to be taken for analysis is left for the chemist to determine depending on the particular test or procedure. In the circumstances, the court satisfied that PW3 had taken sufficient representative sample for his analysis of the crystalline substances to come to an accurate finding of the nature as well as the weight of the drugs. PW3 had also stated in his chemist report that methamphetamine is a drug listed in the First Schedule of the DDA. Thus, the prosecution had proved the second ingredient of the offence (see paras 27–28).

(4) It had been proven that the nett weight of methamphetamine found inside the capacitors in exh P14 that was carried by the accused was 2,285g, which was in great excess than the threshold set at 50g, the accused must be presumed to be trafficking under s 37(da)(xvi) of the DDA. Hence, the third ingredient was also proved (see para 29).

(5) The act of the accused boarding a flight from Hong Kong, transit in Kota Kinabalu before reaching Kuching International Airport with exh P14 which she carried fell within the meaning of 'trafficking' under s 2 of the DDA. In totality, a prima facie case had been made out by the prosecution (see para 30).

(6) The explanations as to how the accused came into possession of exh P14 were not plausible and incredibly unbelievable. The accused's defence on the involvement of Jacklyn and Dick was an afterthought. The request by Jacklyn for the accused to meet an unidentified man to buy electronic things and to bring it to Kuching instead of Singapore should have raised some suspicions in the accused's mind of the contents of exh P14, yet she displayed the conduct of willful blindness when she put her personal belonging and clothing in it and kept it securely locked with a padlock. Further, the failure of the accused to call witnesses had made it impossible for the court to believe what really transpired and the truth of the narration of the events in Hong Kong by the accused. Based on the reasons, the defence had failed to cast a reasonable doubt on the prosecution's case that the accused had actual possession of the drug. Thus, the prosecution had proven its case beyond reasonable doubt (see paras 35–36, 38–39 & 45–46).

[Bahasa Malaysia summary

Tertuduh telah dituduh kerana kesalahan mengedar dadah berbahaya, methamphetamine di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB tersebut') yang boleh dihukum di bawah s 39B(2) yang sama. Pendakwaan bergantung kepada keterangan pegawai-pegawai kastam ('PW4, PW5, PW6 dan PW8'), ahli kimia ('PW3') dan pegawai penyiasat ('PW9') untuk membuktikan kes mereka terhadap tertuduh. Berdasarkan keterangan, selepas tertuduh tiba di Lapangan Terbang Antarabangsa Kuching, tertuduh dilihat membawa beg bagasi hitamnya ('eksh P14') dan selepas diperiksa, pegawai kastam menjumpai beberapa kapasitor dalam eksh P14. PW8 telah memotong salah satu daripada kapasitor itu dan menjumpai bahan yang disyaki dadah. PW3 yang menjalankan analisis kapasitor itu menjumpai bahawa bahan kristal dalam kapasitor itu mengandungi 2,285g methamphetamine. Dalam pembelaan, tertuduh menegaskan bahawa dia tiada pengetahuan tentang kandungan eksh P14 dan adalah pembawa yang tidak bersalah. Tertuduh berhujah bahawa dia telah menerima beg itu daripada seorang lelaki berkulit hitam bernama Dick dan diminta oleh kawannya bernama Jacklyn untuk membawa eksh P14 apabila menaiki penerbangan dari Hong Kong ke Kuching. Tiga elemen penting kesalahan untuk pertimbangan mahkamah adalah: (a) sama ada tertuduh mempunyai dadah dalam milikannya; (b) sama ada dadah itu adalah methamphetamine dan disenaraikan dalam Jadual Pertama ADB tersebut dan adalah seberat 2,285g; dan (c) sama ada tertuduh mengedar dadah itu.

Diputuskan, mensabitkan kesalahan ke atas tertuduh dan menjatuhkan hukuman mati ke atasnya:

(1) Dengan adanya beg bagasi itu dengannya, membawanya dan meletakkannya pada mesin imbas, tertuduh mempunyai jagaan dan kawalan fizikal ke atasnya dan kandungannya. Pengetahuan tertuduh tentang kandungan eksh P14 boleh diambil daripada fakta dan keadaan kes. Dalam kes ini, dadah itu disembunyikan dengan cermat dalam kapasitor yang menunjukkan niat untuk mengelakkan daripada dikesan dan ini menunjukkan pengetahuan tertuduh. Oleh itu, pendakwaan telah membuktikan secukupnya bahawa tertuduh memiliki eksh P14 dan dadah yang ditemui (lihat perenggan 15 & 17–19).

(2) Tidak diragukan identiti ekshibit-ekshibit itu kerana kandungan kapasitor itu masih elok sebelum dihantar kepada PW3 untuk dianalisis (lihat perenggan 23).

(3) Apakah kuantiti sampel yang mencukupi untuk diambil untuk analisis terpulang kepada ahli kimia untuk ditentukan bergantung kepada ujian atau prosedur tertentu. Dalam keadaan ini, mahkamah berpuas hati bahawa PW3 telah mengambil sampel representasi yang mencukupi untuk analisisnya ke atas bahan kristal itu untuk tiba kepada penemuan

tepat tentang sifat dan juga berat dadah itu. PW3 juga menyatakan dalam laporan kimianya bahawa methamphetamine adalah dadah yang disenaraikan dalam Jadual Pertama ADB tersebut. Oleh itu, pendakwaan telah membuktikan elemen kedua kesalahan itu (lihat perenggan 27–28).

(4) Ia telah dibuktikan bahawa berat bersih methamphetamine ditemui dalam kapasitor-kapasitor dalam eksh P14 yang dibawa oleh tertuduh adalah 2,285g, iaitu melebihi ambang yang ditetapkan pada 50g, tertuduh harus diandaikan mengedar dadah di bawah s 37(da)(xvi) ADB tersebut. Justeru, elemen ketiga juga telah dibuktikan (lihat perenggan 29).

(5) Perbuatan tertuduh menaiki penerbangan dari Hong Kong, transit di Kota Kinabalu sebelum tiba di Lapangan Terbang Antarabangsa Kuching dengan eksh P14 yang dibawanya adalah dala maksud 'trafficking' di bawah s 2 ADB tersebut. Secara keseluruhan, kes prima facie telah dibuktikan oleh pendakwaan (lihat perenggan 30).

(6) Penjelasan bagaimana tertuduh memiliki eksh P14 tidak munasaah dan tidak mungkin boleh dipercayai. Pembelaan tertuduh berhubung penglibatan Jacklyn dan Dick adalah suatu yang difikirkan kemudian. Permintaan Jacklyn untuk tertuduh berjumpa dengan lelaki yang tidak dikenal untuk membeli barangan elektronik dan untuk dibawa ke Kuching dan bukan Singapura sepatutnya telah menimbulkan rasa syak dalam pemikiran tertuduh tentang kandungan eksh P14, namun dia menunjukkan perbuatan yang tidak endah apabila dia meletakkan barang milik peribadi dan pakaiannya dalamnya dan menyimpannya selamat berkunci dengan kunci manga. Selanjutnya, kegagalan tertuduh untuk memanggil saksi menjadikannya mustahil untuk mahkamah mempercayai apa yang sebenarnya berlaku dan kebenaran cerita tentang kejadian di Hong Kong oleh tertuduh. Berdasarkan sebab-sebab itu, pembelaan telah gagal untuk membuktikan keraguan munasabah ke atas kes pendakwaan bahawa tertuduh mempunyai milikan sebenar dadah itu. Oleh itu, pendakwaan telah membuktikan kesnya melampaui keraguan munasabah (lihat perenggan 35–36, 38–39 & 45–46).]

Notes

For cases on trafficking, see 4(1) *Mallal's Digest* (5th Ed, 2015) paras 815–975.

Cases referred to

Amith Karinja v PP [2016] MLJU 1438, CA (refd)
Chan Pean Leon v PP [1956] 1 MLJ 237 (refd)
Leong Bon Huat v PP [1993] 3 MLJ 11; [1993] 2 AMR 2132, SC (refd)
Leow Nghee Lim v Reg [1956] 1 MLJ 28 (refd)

Luke Nnaemeka Ugwu v PP (Case No 05–232–10 of 2015) (unreported), FC (refd)
PP v Mohd Radzi bin Abu Bakar [2005] 6 MLJ 393; [2006] 1 CLJ 457, FC (refd)
PP v Reza Mohd Shah bin Ahmad Shah [2002] 4 MLJ 13, HC (refd)
PP v Seow Wei Hoong [2008] 5 MLJ 173; [2008] 4 CLJ 453, CA (refd)
Teh Hock Leong v PP [2008] MLJU 284; [2008] 4 CLJ 764, CA (refd)
Tobechi Chinonso Madu v PP [2015] MLJU 2038, CA (refd)
Warner v Metropolitan Police Commissioner [1968] 2 All ER 356, HL (refd)

Legislation referred to

Criminal Procedure Code ss 402B, 402B(6), 422
Dangerous Drugs Act 1952 ss 2, 37(da)(xvi), (j), 39B, First Schedule
Evidence Act 1950 s 8

Bernard Philip Lanat (BP Lanat & Co Advocates) for the accused.
Mohd Izhanudin bin Alias (Deputy Public Prosecutor, State Attorney General's Chambers) for the prosecution.

Alwi Abdul Wahab JC:

INTRODUCTION

[1] In this trial the accused faced a charge that reads as follows:

> Bahawa kamu pada 17 November 2014, lebih kurang jam 9.10 malam, di Unit Khas Pemeriksaan Penumpang, Jabatan Kastam Diraja Malaysia, Balai Ketibaan, Lapangan Terbang Antarabangsa Kuching, di dalam daerah Kuching, dalam negeri Sarawak telah didapati mengedar dadah berbahaya iaitu Methamphetamine sejumlah 2,285 gram, dan dengan itu kamu telah melakukan suatu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah seksyen 39B(2) Akta yang sama.

PRIMA FACIE CASE

[2] The prosecution called nine witnesses to testify in its bid to prove a prima facie against the accused. A prima facie case is made out if the prosecution has proved all the essential ingredients of the offence by credible and reliable evidence which has been filtered and sieved through maximum process of evaluation. How prima facie is made out is best illustrated by the Federal Court in the case of *Public Prosecutor v Mohd Radzi bin Abu Bakar* [2005] 6 MLJ 393; [2006] 1 CLJ 457 where it was held as follows:

> ... Put shortly, what the trial court is obliged to do under ss 173(f) and 180 of the CPC is to ask itself the question: If the accused elects to remain silent, as he is perfectly entitled to do, am I prepared to convict him on the evidence now before

me? If the answer to that question is in the affirmative, then the defence must be called.

[3] On 14 July 2016, at the end of the prosecution case, I found that a prima facie case has been made out as the prosecution has proven the essential ingredients of the offence for which she was charged with namely:

(a) the accused had the drug in his possession;

(b) the drug is methamphetamine and listed in the First Schedule of the Dangerous Drugs Act 1952 ('the DDA 1952') and weighed 2285g; and

(c) the accused did traffic in the drug.

[4] For ease of reference, my ruling at the end of the prosecution case is reproduced as follows:

(a) at the conclusion of the case for the prosecution, I am satisfied that the prosecution had proved, prima facie, that the accused had physical possession of the 2285g of methamphetamine at the time and place stated in the charge;

(b) the prosecution has proven that the accused had physical custody and control over the black luggage bag ie American Tourister (exh P14) carried by her on her arrival at the Kuching International Airport at the material time. The accused placed exh P14 on the roller of the scanner machine for it to be scanned and the customs officers could see the suspicious image displayed from the monitor. The accused took out a key from her handbag brand 'Guess' (exh P13) to open the padlock of exh P14;

(c) exh P14 contained among others a total of 131 capacitors (loose capacitors as well as capacitors which are fixed on a number of printed circuit boards). Upon examination, the capacitors were found to contain crystalline substance and suspected to be methamphetamine. The chemist ('PW3') testified that he analysed the crystalline substance and found it to contain 2285g of methamphetamine which is a scheduled drug under the First Schedule of s 2 of the DDA 1952;

(d) the accused knowledge on the contents of the capacitors ie the crystalline substance can be inferred from the facts and the surrounding circumstances of the case. The key to exh P14 was kept by her. In my view nothing could be placed into exh P14 or taken out of it without her assent. This call for an explanation as to how the accused came to be in the possession of the said offensive drugs;

(e) as the amount of drugs in the present case exceeded 50g of methamphetamine, it would attract the statutory presumption of

trafficking under s 37(da)(xvi) of the DDA that the accused shall be presumed, until the contrary is proved, to be trafficking in the said drug;

(f) there is no doubt on the identity of the exhibits recovered during the seizure and the exhibits which were sent to the chemist for analysis. Both PW3 and PW8 cut opened the capacitors and they did it for different purposes. PW8 cut opened the capacitors during the seizure to show to the accused its contents. He closed back the capacitors and did not disturb its contents. On the other hand, the chemist PW3 cut opened the same capacitors to extract its contents for the purpose of analysis; and

(g) I disagree with learned counsel's interpretation on s 37(j) of the DDA 1952. In the case of *Public Prosecutor v Seow Wei Hoong* [2008] 5 MLJ 173; [2008] 4 CLJ 453, the Court of Appeal held that what would be an adequate quantity of the samples to be taken for analysis is left for the chemist to determine. In the circumstances of this case, I am satisfied that PW3 had done the proper tests and the representative samples were sufficient to come to an accurate finding of the nature as well as the weight of the drugs.

THE EVIDENCE AT THE END OF THE PROSECUTION CASE

[5] The evidence led by the prosecution is that on 17 August 2014, at about 12.15pm, the accused flew in from Hong Kong and her flight had a transit at Kota Kinabalu Airport before arriving at Kuching International Airport. She carried along with her two bags ie a luggage bag brand 'American Tourister' which is black in colour (exh P14) and a handbag brand 'Guess' (exh P13). At the arrival hall of Kuching International Airport she was spotted by customs officers ie PW4 (Nur Akmal Hafiez) and PW5 (Marlcus Leno ak Duis) who were on duty at that time. PW4 who manned the scanning machine instructed the accused to scan her luggage bag exh P14 which she did by putting it on the roller of the scanning machine. At the monitor of the scanning machine, PW4 could see a suspicious image from exh P14. He stopped the accused from taking away exh P14 and hit the buzzer alarm to notify PW5 of what he saw. PW5 came near to the scanning machine and instructed the accused to bring exh P14 to the examination counter next to the scanning machine.

[6] At the examination counter, PW5 asked the accused to open up exh P14 as it was locked by a padlock (exh P23(c)) for further inspection in the presence of customs officer Luis ak Nanga ('PW6'). The accused opened up the padlock P23(c) by using the keys (P23(a and b)) which she took from her handbag exh P13. Found inside exh P14 were electronic components ie 'printed circuit boards' and attached to it were several capacitors. There were also some loose capacitors inside exh P14 besides the accused's clothing and her personal items.

[7] PW6 then took one of the printed circuit boards with the capacitors attached to it for scanning and the monitor of the scanning machine showed a suspicious image indicating that there were something hidden inside these electronic components. The result of the scanning was also seen by PW5. PW6 repeated the scanning by taking another printed circuit board and the result showed the same as the previous scanning. PW6 also scanned the loose capacitor and the result was the same that it showed suspicious image on the monitor of the scanning machine.

[8] PW6 then called up a woman customs officer namely Si Kui Sian ('PW7') to help him handling and escorting the accused to the passenger's examination room at the Kuching International Airport for his further action. The accused closed up exh P14 by herself and followed PW6 and PW7 to the passenger's examination room while PW4 and PW5 continued to do their duty at the arrival hall.

[9] PW8 (Gerry Ho) and PW2 (Stephen ak Pina) arrived at the Kuching International Airport and met up with PW6 who briefed them on the matter. PW8 took out the loose capacitor and examine it. He tested the contents of the capacitor using a device called 'Trunac' and the result showed that it was suspected drugs. He then instructed the accused to put all the items back in exh P14 before escorting her to the Narcotic Office, Customs Department at Jalan Matang for further inspection. At the Narcotic Office, the entire contents of exhs P13 and P14 were inspected by PW8 and he found that only exh P14 contained the electronic components. In exh P14, he found 27 'loose capacitors' and 13 unit 'printed Circuit Boards' with eight capacitors attached to each unit. The capacitors contained materials which are suspected to be drugs. All the items and drugs found on the accused were recorded and listed in the three search lists ie exh P24, exh P26, and exh P27. The arrest report of the accused was made by PW6 and marked as exh P29. All the exhibits together with the accused were handed by PW8 to investigating officer Misell ak Rondeng ('PW9') as evidenced by the handing over note exh P28.

[10] The exhibits namely the capacitors were then handed to the chemist ie Mohd Riduan Md Bakhir ('PW3') for analysis. These exhibits were put inside the 14 brown envelopes marked individually as envelope 'No 1' to envelope 'No 14'. These 14 brown envelopes were then put in a box marked 'R'. Upon his analysis, PW3 stated that the crystalline substances found inside the capacitors contained 2285g of methamphetamine which is a type of drug listed under the First Schedule of the DDA 1952. PW3 prepared a chemist report exh P17 and handed it over to PW9 together with the box marked 'R' on the 4 February 2015.

THE ACCUSED HAD THE DRUG IN HIS POSSESSION

[11] It is trite law that prosecution must establish that the accused had possession and knowledge of the dangerous drugs to bring home the charge under s 39B of the DDA. The meaning of 'possession' in the context of the DDA is explained in the case of *Leow Nghee Lim v Reg* [1956] 1 MLJ 28 where Taylor J at p 31 had this to say as follows:

> The words 'possession' is a vague and general word which cannot be closely defined. Without at least general knowledge, there cannot be possession but there can be possession without full and exact knowledge. This is recognised in the present Drugs Ordinance which provides by the presumption that if a man has a custody or control of a drug, the onus of proving, first that he did not have possession and secondly that he did not know the nature of the drug, shall be shifted to him.

[12] The word 'possession' was further elaborated in *Chan Pean Leon v Public Prosecutor* [1956] 1 MLJ 237 at p 239, where Thomson J held:

> 'Possession' itself as regards the criminal law is described as follows in *Stephen's Digest* (9th Ed p 304) ... A moveable thing is said to be in the possession of a person when he is so situated with respect to it that he has the power to deal with it as owner to the exclusion of all other persons, and when the circumstances are such that he may be presumed to intend to do so in case of need ... Intention is a matter of fact, which in the nature of things cannot be proved by direct evidence. It can only be proved by inference from surrounding circumstances. Whether these surrounding circumstances make out such intention is a question of fact in each individual case ...

[13] In *Public Prosecutor v Reza Mohd Shah bin Ahmad Shah* [2002] 4 MLJ 13, the High Court explained proving possession as having to show that the accused had custody or control of the dangerous drugs and that he had the required knowledge of the thing possessed. Custody or control can be proved by direct evidence or by drawing inferences from proved facts. With regard knowledge, the court is not concerned with the knowledge of a reasonable man but reasonable inference of knowledge to be drawn from a situation.

[14] In *Warner v Metropolitan Police Commissioner* [1968] 2 All ER 356 at p 367 Lord Reid speaking for the majority in the House of Lords stated that it would be pedantic to hold it must be shown that the accused knew precisely which drug he had in his possession, rather, it would be quite sufficient to prove facts from which it could properly be inferred that the accused knew that he had a prohibited drug in his possession.

[15] In our present case, it is my view that that there was direct evidence of the accused's physical control and custody of exh P14 and its contents ie the 13 printed circuit boards together with eight pieces of capacitors attached to each

of the boards and the 27 pieces of loose capacitors containing crystalline substances. This followed from the evidence of PW4 and PW5 who spotted the accused on her arrival from Hong Kong at the arrival hall of the Kuching International Airport carried a luggage bag P14. Upon instructed by PW4 to put her bag on the scanning machine, she fully cooperated and put it on the roller of the scanning machine. When the bag was scanned the images of the suspected drugs were shown from the monitor screen of the scanning machine. By having the luggage bag with her, carrying it and putting it on the scanner machine, the accused had taken physical custody and control of it and its contents.

[16] When PW5 asked the accused to open up exh P14 which was padlocked, the accused took out the key from her handbag 'Guess' (exh P13) and opened it. Once exh P14 was opened, PW5 could see the electrical components in it witnessed by PW6. PW6 then took out the printed circuit board and one piece of the loose capacitor for scanning and the result showed that there was something suspicious appeared on the monitor of the scanning machine. At this juncture, I would say, if the luggage bag exh P14 was not hers or it had been mistakenly taken by her, she would have stated her mind to the customs officers but she did not. She took out the key to exh P14 without much hassle when she was instructed to open it by PW5 and in it was found the capacitors containing drugs.

[17] The cumulative evidence of PW4, PW5 and PW6 was sufficient to prove prima facie that the accused had physical control and custody of exh P14 from the point of time she was spotted carrying it by PW4 and PW5 until it was scanned and opened with the key she herself provided. The accused's knowledge of the contents of exh P14 could be inferred from the facts and the circumstances of the case. By holding the key closed to herself inside the handbag that she carried, I cannot imagine who else could have accessed to the key and put anything inside P14 without her consent. Apart from the drugs, the accused's clothes and personal items were also found inside P14. Further, it was checked in by the accused and given with a luggage tag exh P21 with the accused's name stated on it.

[18] In the present case, the drugs were carefully concealed inside the capacitors which indicates an intention to avoid detection and thereby point to the accused's knowledge. In the Court of Appeal's case of *Teh Hock Leong v Public Prosecutor* [2008] MLJU 284; [2008] 4 CLJ 764, it was held that the manner or the method employed to convey or transport the drugs may sometimes furnish evidence of knowledge.

[19] There is no denying that the accused in our present case had physical control and custody of exh P14 and knowledge of its contents can be inferred

from the circumstances and facts of this case. I found and held that the prosecution had sufficiently proved that the accused was in possession of exh P14 and the drugs which were found in it. This call for an explanation as to how the accused came to be in the possession of the said offensive drugs.

THE DRUG IS METHAMPHETAMINE AND LISTED IN THE FIRST SCHEDULE OF THE DANGEROUS DRUGS ACT 1952 ('THE DDA 1952') AND WEIGHED 2285G

[20] The chemist, PW6 (Mohd Riduan bin Md Bakhir) testified that he received a box marked 'R' sealed with Royal Malaysian Customs seal from PW9 on the 21 November 2014. He said he checked the contents of the box marked 'R' and found inside it 14 brown envelops labelled as 'No 1' to 'No 14'. Inside the envelope No 1, there were 27 pieces of loose capacitors labelled as A2(1)–A2(27); in envelope No 2, there were eight pieces of capacitors labelled as A3(1)(a)–A3(1)(h); in envelope No 3, there were eight pieces of capacitors labelled as A4(1)(a)–A4(1)(h); in envelope No 4, there were eight pieces of capacitors labelled as A5(1)(a)–A5(1)(h); in envelope No 5, there were eight pieces of capacitors labelled as A6(1)(a)–A6(1)(h); in envelope No 6, there were eight pieces of capacitors labelled as A7(1)(a)–A7(1)(h); in envelope No 7, there were eight pieces of capacitors labelled as A8(1)(a)–A8(1)(h); in envelope No 8, there were eight pieces of capacitors labelled as A9(1)(a)–A9(1)(h); in envelope No 9, there were eight pieces of capacitors labelled as A10(1)(a)–A10(1)(h); in envelope No 10, there were eight pieces of capacitors labelled as A11(1)(a)–A11(1)(h); in envelope No 11, there were eight pieces of capacitors labelled as A12(1)(a)–A12(1)(h); in envelope No 12, there were eight pieces of capacitors labelled as A13(1)(a)–A13(1)(h); in envelope No 13, there were eight pieces of capacitors labelled as A14(1)(a)–A14(1)(h); and in envelope No 14, there were eight pieces of capacitors labelled as A15(1)(a)–A15(1)(h). In total, there were 131 pieces of capacitors.

[21] PW3 further testified that there were crystalline substances found inside all the capacitors and upon his analysis, he found that these crystalline substances contained 2285g of methamphetamine. The weight of the crystalline substances and the total weight of methamphetamine found in it upon analysis in each envelopes is detailed out in PW3's chemist report marked as exh P17.

[22] In his submission at the end of the prosecution case, learned counsel submitted that there were grave and serious discrepancies in the evidence of the prosecution as regards to who actually did the opening-up of the capacitors as both PW3 and PW8 claimed to have opened the capacitors. In this respect, both PW3 and PW8 had clearly explained how they did the opening-up or the cutting open of the capacitors. PW8's evidence in re-examination on how he

opened up the capacitors are reproduced as follows:

Q: When my learned friend asked you with regards to the issue of opening up the capacitors you told the court that you were the one who opened up the capacitors, would you care to explain to the court how actually you do it?

A: Each capacitor was being cut on the upper parts, I cut a small opening on the top and show it to the accused closed it back with a cap put inside the plastic bag and weighed.

Q: Could you explain to the court after you opened up the capacitors, how actually you maintained the integrity of each capacitor and its contents therein?

A: Like I say before each capacitor after being shown the contents to the accused, we closed back with a cap that we had cut. So none of the contents were removed.

In re-examination, PW3 gave evidence on how he opened up the capacitors are reproduced as follows:

Q: Can you tell the Court why the pattern of cutting A2(27) is different from others capacitors label A2(1) to A2(26)?

A: This is my first effort to cut open the capacitor and I realise this is not the best way to cut it so I tried another method and found the cutting method on capacitors marked A2(1) to A2(26) is the easiest method.

Q: Can you tell the Court whether the different method employs in open up the capacitor could interfere with your findings?

A: No. This is the method of taking out the crystalline substance only.

Q: Do you recognise all the open up capacitors and how could you identify them?

A: There is my laboratory number and my initial on each capacitor.

[23] From the evidence of PW3 and PW8 above, it can be clearly seen that when PW8 cut opened the capacitors, he only made a small opening on the top of the capacitors to ascertain its contents in front of the accused. The small opening was closed up again with the cap which had been cut off. PW8 did not cut it off until both the top part and bottom part were severed as what the chemist PW3 did to the capacitors in order to extract its contents for the purpose of the analysis. In my view, there were no material contradictions between the evidence of PW3 and PW8 in this respect and it is important to note that the contents of those capacitors were still intact before they were sent to PW3 for analysis. There is, therefore, no doubt as regards to the identity of the exhibits particularly the crystalline substances which were taken out by

PW3 from the inside of the capacitors for analysis and later upon his examination he found that such crystalline substances were to contain methamphetamine.

[24] Under the same heading, learned counsel raised the issue that PW3 did not take sufficient representative sample for the purpose of analysis pursuant to s 37(j) of the DDA 1952 which is stated as follows:

> Section 37(j) of the DDA 1952
>
> 37 In all proceedings under this Act or any regulation made thereunder —
>
> (j) when any substance suspected of being a dangerous drug has been seized and such substance is contained in a number of receptacles, it shall be sufficient to analyse samples of the contents of a number not less than ten percentum of such receptacles and if such analysis establishes that such samples are all of the same nature and description, it shall be presumed, until the contrary is proved, that the contents of all the receptacles were of the same nature and description as the samples so analyzed and if such analysis establishes that such samples consist of or contain a dangerous drug, it shall be presumed, until the contrary is proved, that the contents of all the receptacles consist of or contain the same proportion of such drug;

[25] Learned counsel referred to PW3's witness statement (WSPW3) where the nett weight of the crystalline substance and the nett weight drugs for each envelopes 'No 1' to 'No 14' are tabulated in table form. For all these 131 capacitors in all the 14 envelopes, the total net weight of the crystalline substance is 2921g while the total net weight of the drugs is 2285g. Learned counsel submitted that the ten percentum (10%) of the representative samples either for the crystalline substance or drug, would be 29.21g or 22.85g respectively as required under the provision of s 37(j) of the DAA 1952. It was argued therefore that the amount of representative sample of around 150 mg of homogeneous powder for each envelope which would give a total of 2100mg or 2.1g taken by PW3 for his analysis is too little and below what is legally required under the said abovementioned provision.

[26] PW3 in his witness statement (WSPW3), testified that for the quantitative test, he took out seven representative samples of the homogeneous powder from each envelope. Before this he said he blended the crystalline substances and homogenised it to make sure that the materials are well and evenly mixed up in powder form. PW3 further said what he meant by 'representative samples' is that the samples which were taken at random to represent the entire homogeneous sample in that the analysis results for the representative samples were also the results of the analysis of the entire sample in the envelope.

[27] With that explanation, regret that I cannot agree with learned counsel's

submission pertaining to the prosecution non-compliance of s 37(j) of the DAA. I also refer to the Federal Court's case of *Leong Bon Huat v Public Prosecutor* [1993] 3 MLJ 11; [1993] 2 AMR 2132 cited by the learned DPP in which case it was held that what would be adequate quantities of the sample required for the chemical test depend on the particular circumstances of each case and there is no mathematical formula to determine such quantities. In my view, what can be understood from the above decision is that what would be an adequate quantity of the samples to be taken for analysis is left for the chemist to determine depending on the particular test or procedure. I find support of this proposition in the other Court of Appeal's case of *Public Prosecutor v Seow Wei Hoong* [2008] 5 MLJ 173; [2008] 4 CLJ 453. In the present case, PW3 gave clear evidence that he had homogenised the substance and a fair representative sample was taken by him from this homogenised substance for analysis. He also stated in his chemist report that the representative sample which he took at random represents the entire homogenised substance which in turn to mean that the analysis results for the representative sample is also the results of the analysis of the entire sample of the homogenised crystalline substances.

[28] In the circumstances, I am satisfied that PW3 had taken sufficient representative sample for his analysis of the crystalline substances to come to an accurate finding of the nature as well as the weight of the drugs. Finally, PW3 also stated in his chemist report exh P17 that methamphetamine is a drug listed in the First Schedule of the DDA 1952. Thus, the prosecution had proved the second ingredient of the offence.

THE ACCUSED DID TRAFFIC IN THE DRUG

[29] The last ingredient that the prosecution needs to prove is that the accused did traffic in the drug. The prosecution relied on the presumption of trafficking under s 37(da)(xvi) of the DDA 1952 that any person found to be in possession of 50g or more in weight of methamphetamine shall be presumed, until the contrary is proved, to be trafficking in the said drug. It had been proven that the nett weight of methamphetamine found inside the capacitors in exh P14 that was carried by the accused is 2285g, which is in great excess than the threshold set at 50g, the accused must be presumed to be trafficking under s 37(da)(xvi) of the DDA 1952. The above ingredient is thus proved.

SECTION 2 OF THE DDA 1952

[30] Apart from proving all the three ingredients, the prosecution had proven to this court that the act of the accused, boarding a flight from Hong Kong, transit in Kota Kinabalu before reaching Kuching International Airport with exh P14 which she carried falls within the meaning of 'trafficking' under

s 2 of the DDA 1952.

[31] Having found that a prima facie case has been made out, I call upon the accused to enter her defence. The accused is the only witness called in defence and she elected to give sworn evidence.

THE DEFENCE CASE

[32] The accused defence is basically of having no knowledge of the contents of exh P14 when she was asked to carry it by a friend named Jacklyn when she boarded a flight from Hong Kong to Kuching. Her defence is premised on these facts. On 12 November 2014 she left Philippines for Hong Kong to survey goods that she may later buy and resell. While in Hong Kong she received a phone call from her girlfriend Jacklyn asking her to buy 'electronic things' at the place called Chiew Siew Fo which is near the train station. On the same day ie 14 November 2014, she went to the said place to look for the electronic things when someone whom she described as a black man named Dick called her up by her name and asked her whether she was Jacklyn's friend. When she answered 'yes', Dick then passed electronics wire and a bag (exh P14) which contained the things that Jacklyn had bought with a receipts issued to the accused. She took them back to her place of stay in Hong Kong ie Cause Bay Hostel. At the hostel, she opened up exh P14 as it was heavy and therein she saw the electronic things. She said she was not familiar with the electronic things, so she took the pictures of these electronic things and sent them via email to his boyfriend in Singapore by the name of Choo Chong Soon. When her boyfriend later replied her that what were in the pictures were just electronic things and that the reason why they were heavy is because of the motherboard, the accused then decided to put her personal belongings inside exh P14 as she does not want to carry too many bags on her return flight.

[33] On 15 November 2014, the accused decided to call Dick because she wanted to return exh P14 to him through his handphone number which was given to her earlier. None of the calls were answered except for one time but he was just singing. After her attempt to contact Dick was unsuccessful, the accused then went back to Chiew Siew Fo again only to find that he was no more there. On the 16 November 2014, she received a call from Jacklyn. At first, she said she did not want to bring exh P14 back to Singapore which was her intended destination but upon persuasion by Jacklyn she agreed to bring it to Kuching as Jacklyn wanted to meet her and collect exh P14 in Kuching.

[34] On arrival at Kuching International Airport on 17 November 2014, she said she was stopped by a customs officer after he got her luggage bag exh P14. She put exh P14 on the roller of the scanning machine when asked by the customs officer as she said it was normal. She then opened exh P14 for its

contents to be examined and later she was informed that the things found in her exh P14 was a drug called methamphetamine. She said she did not know what 'methamphetamine' is but when she was further told that it was a 'syabu', she then cried. The accused claimed that she had no knowledge that the electronic things found in exh P14 which were later identified as capacitors to contain drugs. In other words she was an innocent carrier. She said she trusted Jacklyn a lot as she had knew her for eight months when they were staying together in Singapore.

[35] The above explanations as to how the accused came into possession of exh P14 are not plausible and incredibly unbelievable. It is very strange to note that she was instructed by Jacklyn to go to Chiew Siew Fo to meet someone whom she did not personally know and to buy electronic things which were not ascertained as to the type of electronic things, its price and quantity. I find it improbable for Dick to be able to recognise and identify the accused when they have never met each other before especially at the crowded public area near the train station.

[36] Jacklyn insisted her to bring exh P14 to Kuching and the accused did not bother to find out from Jacklyn what was the things inside exh P14 and why it is so important to her despite the accused's return flight was to Singapore and by the accused's own admission that the things was heavy. She could have checked the contents of the bag while it was under her custody for almost three days prior to her return trip but she did not. The defence argued that the accused had done what she was supposed to do by sending the pictures of the capacitors to her boyfriend and was advised that there was nothing amiss about it. However, I find that the explanation offered by the accused had missed the point. In my view, the request by Jacklyn for the accused to meet an unidentified man to buy electronic things and to bring that things to Kuching instead of Singapore should have raised some suspicions in her mind of the contents of exh P14. Yet she displayed the conduct of wilful blindness when she put her personal belonging and clothing in it and kept it securely locked with a padlock. In her defence, she merely stated that she was sceptical of bringing exh P14 because she was not familiar with the electronic things and it was also heavy. That was when she sent the pictures of the capacitors to her boyfriend. At no point in time that she ever stated her mind especially to her boyfriend that she was scared or worried to bring exh P14 due to the manner how the request was made by Jacklyn as well as the manner it was given to her by an unidentified man as related by her in her defence.

[37] The air ticket from Hong Kong to Singapore had been purchased and paid for by Jacklyn but the air ticket for Hong Kong to Kuching which was also supposed to be sponsored by Jacklyn as promised was not paid when she discovered it at the Hong Kong airport on the 17 November 2014. She

proceeded to Kuching anyway as she trusted Jacklyn and furthermore she wanted to visit Kuching. There was no plausible explanation on why Jacklyn wanted to meet her in Kuching when she already had a confirmed ticket to Singapore. If at all the fact about the meeting is true, it would only be convenient for it to be held in Singapore as the accused's boyfriend is residing in Singapore which was also her intended destination. It would also be incredible that she is prepared to waste her paid air ticket to Singapore and to come out with an extra expenses to purchase the air ticket to Kuching when the meeting with Jacklyn could have been made in Singapore. Furthermore, I also find that the accused's story regarding the intended meeting between her and Jacklyn in Kuching is improbable as they had never fixed the time and place to meet upon her arrival at the Kuching International Airport.

[38] It is my view that the accused's defence on the involvement of Jacklyn and Dick in this case is an afterthought. The accused's caution statement stated the characters of Jacklyn and a black man without mentioning his name. The full address of Jacklyn and Dick were not given by the accused let alone their contact number to enable the investigating officer to conduct proper investigations. Without these details, the investigating officer could not be expected to investigate whether the said characters exist to corroborate the accused's story. On this point, I refer to the case cited by the learned DPP in his submission ie the Court of Appeal's case of *Tobechi Chinonso Madu v Public Prosecutor* [2015] MLJU 2038 and it was held that:

> [16] The mere fact that Ossy's name was mentioned during the police investigation is not evidence that Ossy actually exists. How were the police to investigate the existence of this person when the appellant did not even give his full name and his address? The poor investigating officer may end up chasing a wild goose. We therefore found no merit in the appellant's argument that the police's failure to investigate the existence of Ossy must be held against the prosecution.
>
> [17] In any event, since the appellant had a legal burden to discharge (to disprove knowledge) it was his duty to call Ossy to give evidence and not for the police to investigate if it was true that Ossy had asked him to carry the soap boxes: *Baharom v Public Prosecutor* [1960] MLJ 429; [1960] 1 LNS 9; *Liew Siew & Anor v Public Prosecutor* [1969] 1 LNS 90; *Chu Tak Fai v Public Prosecutor* [1998] 4 CLJ 789. Hence, since Ossy was not called to give evidence there was no way the court could verify the truth of what Ossy told him at Lagos Airport. In fact the evidence is hearsay and inadmissible as the object was to prove the truth of what Ossy told him: *Public Prosecutor v Subramaniam* [1956] MLJ 220 (PC).

[39] Based on the above case, it is the duty of the accused to at least call her boyfriend Choo Chong Soon as her witness and to furnish the details information about Jacklyn and Dick to disprove that she had knowledge of the drugs inside exh P14. It follows that since no witnesses were called up by the

accused to give evidence in her defence, it is impossible for this court to believe what really transpired and the truth of the narration of the events in Hong Kong by the accused.

[40] The defence also argued that the fact that the accused had cooperated with the customs officers and cried when she was informed that the things found in exh P14 contained drugs were consistent with a conduct of an innocent person which I disagree. In the Court of Appeal's case of *Amith Karinja v Public Prosecutor* [2016] MLJU 1438, these same reasons were given by the accused in that case but the court held that it cannot be used to support the defence of having no knowledge of the drug. They are at best neutral evidence which neither support nor demolish the defence. The Court of Appeal also held that the accused spontaneous act of crying as in the present case is relevant under s 8 of the Evidence Act 1950 to show the accused's guilty mind.

[41] For completeness, I wish to put on record that just before the ruling of no case to answer on the 14 July 2016, the learned DPP requested this court to make an order for the witnesses statements which were tendered and marked as part of the evidence of the witnesses be taken as read if they were not read aloud pursuant to the recent decision of the Federal Court on this point in *Luke Nnaemeka Ugwu v Public Prosecutor* (Case No 05–232–10 of 2015). The learned DPP informed this court that there was no grounds of decision released as yet and until the writing of this judgment, the position remains the same that the full grounds of decision is still not available. Both the learned DPP and learned counsel for the accused did not make any submission on this issue of non-compliance of s 402B(6) of the Criminal Procedure Code ('the CPC') in their submissions of no case to answer as well as in their final submission at the end of the defence case.

[42] As the matter is raised, it is appropriate to produce how the witness statement of the prosecution witness was accepted and marked by this court. The first prosecution witness who used the witness statement is PW2 and the relevant part of the notes of proceedings in respect of this witness on the use of witness statement is reproduced as follows:

> Examination-in-chief of PW2 by DPP Izhanudin:
>
> Q: Do you prepare any Witness Statement for this case?
>
> A: Yes.
>
> Q: If I show you one Witness Statement could you affirm whether this Witness Statement was prepared by you for this case?
>
> A: Yes.
>
> DPP Izhanudin: I show one Witness Statement to the witness.

Q: Could you read the Witness Statement for the Court?

A: (PW2 read his Witness Statement to the Court). I wish to make some amendments:

1. The sixth paragraph date should be 15.11.2014.
2. Paragraph 8 should be read as paragraph 7. Paragraph 9 should be read as paragraph 8. Paragraph 10 should be read as paragraph 9. Paragraph 11 should be read as paragraph 10.
3. The new paragraph 8 the total number of photographs taken should be 495.

DPP Izhanudin: Pray for the witness to sign and date the Witness Statement.

(PW2 signed and dated his Witness Statement)

DPP Izhanudin: The prosecution would like the Witness Statement to be marked.

Court: Witness Statement of PW2 marked as *WS-PW2*.

[43] It is clear from the above notes of proceedings recorded in respect of PW2 that he read out aloud his witness statement to the court to the extent that he pointed to the court that he wished to make some amendments to the said witness statement. Furthermore, it was established by the prosecution that the witness statement was prepared by PW2 for this case.

[44] I find that there is no substantial miscarriage of justice which had occurred on the use of witness statement for this case since parties had agreed for it to be used in the first place. As I have mentioned above, learned counsel for the accused did not raise any submission to show discontentment over how the witness statement was tendered and accepted although the opportunity was given for parties to submit when the request for the court's order was made by the learned DPP just before the ruling of no case to answer by the court.

CONCLUSION

[45] Based on the above reasons, I find that the defence had failed to cast a reasonable doubt on the prosecution case that the accused had actual possession of the drug. It was improbable for the accused not to have knowledge of the drug given the circumstances and facts of this case. The defence also had failed to rebut the presumption of trafficking under s 37(da)(xvi) of the DDA 1952 on the balance of probabilities. Further, the act of ferrying the drugs in exh P14 by the accused falls within the definition of trafficking under s 2 of the DDA 1952 although the actual purpose of carrying the drugs was not achieved.

A CONVICTION AND SENTENCE

[46] Having regard to the totality of all the evidence at the conclusion of the whole trial, I am satisfied that the prosecution had proven its case against the accused beyond reasonable doubt. Accordingly, I find the accused guilty of the B charge of trafficking and convict him on it. The accused is sentenced to the only punishment mandated by law, and that is, to be hanged by the neck till he is dead. All exhibits except the documentary ones are to be returned to the prosecution for safe keeping until the disposal of any appeal.

C *Accused convicted of the offence and sentenced to death.*

Reported by Dzulqarnain Ab Fatar

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